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No. 00-730

In the

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, American Civil Rights Institute, and Center for Equal Opportunity respectfully submit this brief amicus curiae in support of Petitioner Adarand Constructors, Inc. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, or the purposes of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it concerns government's proper role in enacting race preferences.

The American Civil Rights Institute (ACRI) is a national civil rights organization, based in Sacramento, California, created to educate the public about the problems created by governmental race and sex preferences. ACRI's initial focus was on monitoring the implementation of the California Civil Rights Initiative, which was added to the California Constitution as Article I, Section 31 when the voters approved Proposition 209. ACRI's chairman is Ward Connerly, who was the Chairman of the Yes-on-209 campaign in the California

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[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

1996 general election and was a signatory of the argument appearing in the ballot pamphlet in favor of that initiative.

The Center for Equal Opportunity (CEO) is a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race and ethnicity. CEO has participated actively in a wide variety of civil rights cases including: *Alexander v. Sandoval*, 149 L. Ed. 2d 517 (2001); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

STATEMENT OF THE CASE

This Court granted certiorari to determine the following questions.

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

As noted by the Tenth Circuit, the statutory framework of the Department of Transportation's current Disadvantaged Business Enterprise (DBE) program is formed by sections 8(a), 8(d), and 502 of the Small Business Act of 1958, as amended, (SBA), 15 U.S.C. §§ 637(a), (d), and 644(g); the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987); section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914, 1919-21 (1991); section 1101(b) of the Transportation Equity Act for the 21st Century of 1998 (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, 113-15 (1998), and their accompanying

regulations. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1158 (10th Cir. 2000).

Section 8(d)(1) of the SBA declares it to be "the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1). The SBA defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals" are defined by the SBA as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). *Adarand*, 228 F.3d at 1160.

As found by the court below, *id.* at 1160-61:

> STURAA, ISTEA and TEA-21, the transportation appropriations statutes at issue in this case incorporate the presumption of disadvantage from SBA § 8(d). See STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B); TEA-21 § 1101(b)(2)(B) (providing that the term "socially and economically disadvantaged individuals" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto.") STURAA, ISTEA, and TEA-21 all set forth aspirational goals of 10% DBE participation in federal subcontracting. See STURAA § 106(c)(1); ISTEA § 1003(b)(1); TEA-21 § 1101(b)(1).

The question before this Court is whether Congress had a compelling interest to enact this type of race preference

legislation and, if so, whether these race-based preferences are narrowly tailored to serve that interest.

SUMMARY OF ARGUMENT

The analysis of civil rights law set forth in *Hi-Voltage Wire Works, Inc. v. City of San Jose* shows that the proper interpretation of equal protection law is one that prohibits government from benefiting or burdening individuals on the basis of race. The federal highway construction statutes fail this test in granting preferences to members of some minority groups solely on the basis of their race. In enacting the race preferences at issue, Congress has failed to make findings identifying specific discrimination and therefore has been unable to create narrowly tailored remedial programs which compensate actual victims of race discrimination. This defect violates the equal protection component of the Fifth Amendment.

INTRODUCTION

The only conceivable rationale available for racial preferences in the contracting context is remedial-stopping discrimination and making whole its past victims. But in 2001, there will never be an instance where such discrimination can pass strict scrutiny, because there will always be a better approach to remedying any discrimination than granting preferences based on race. Bidding generally has been and always can be structured so that the low bidder will know if he was discriminated against. Nor are preferences needed as a prophylactic measure to head off discrimination, since the government can require publication and wide circulation of contracting opportunities. Moreover, the systemic, formal racial discrimination that might have justified blanket racial classifications is, happily, now a thing of the past in the contracting area. Instead, many governments are under political pressure to discriminate in favor of some minorities. Even if there could still, in theory, be a few cases of discrimination that

go unremedied in the absence of racial classifications, there will be many more cases of discrimination that will result from the institutionalization of racial preferences. This Court gave some leeway to government actors in its *Adarand* and *Croson* decisions, but now it is being taken advantage of. Consider this very case, where the federal executive branch, State of Colorado, and court of appeals all have failed to make a good faith attempt to follow this Court's 1995 decision. Instead, they have exploited the fact that the Court left the door slightly ajar and have driven a truck through it. The time has come to shut that door.

ARGUMENT

I

THE HISTORY OF CIVIL RIGHTS LITIGATION DEMONSTRATES THAT THE EQUAL PROTECTION COMPONENT OF THE CONSTITUTION SHOULD BE INTERPRETED TO PROHIBIT BOTH RACE-BASED PREFERENCES AND DISCRIMINATION

A useful primer on the changing state of civil rights law is set out in the recent decision of the California Supreme Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). In holding that a city's race and sex preferences in public contracting violated the state constitution, the court provided an in-depth review of this Court's analysis of civil rights. As the California court found: "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race." *Id.* at 541 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring), and *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting)).

A. The Initial Promise of Equality Betrayed by *Dred Scott* and *Plessy*

Citing the Declaration of Independence, the California court noted that while our nation was founded on the principle that "all men are created equal," "our history reflects a continuing struggle to enable every individual to fully realize this 'self-evident' article of faith." (Citing *Regents of the University of California v. Bakke*, 438 U.S. at 387-95 (Marshal, J., concurring and dissenting).) *Hi-Voltage*, 12 P.3d at 1072.

The California court found that while the courts have often served to effect positive change in the quest for equality, their articulation of a coherent vision of the civil rights guaranteed by our Constitution has had its low points. "The nadir was perhaps the *Dred Scott* decision, in which the United States Supreme Court denied citizen status to African-Americans, 'whether emancipated or not.'" *Hi-Voltage*, 12 P.3d at 1073 (citing *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1856)).

After the Civil War, Congress overturned the *Dred Scott* decision through its adoption of the Fourteenth Amendment expressly defining citizenship and forbidding any state from "denying to any person within its jurisdiction the equal protection of the laws." Yet, in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), this Court upheld state-initiated race restrictions and approved legally enforced segregation on a "separate but equal" rationale. *Hi-Voltage*, 12 P.3d at 1073.

> Although speaking only for himself at the time, Justice Harlan vigorously dissented: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."

Hi-Voltage, 12 P.3d at 1073 (citing *Plessy*, 163 U.S. at 559-60 (Harlan, J., dissenting)).

B. *Brown* Seeks To Remove the Use of Race from Government Decisionmaking

Justice Harlan's vision of color-blind equality before the law would not prevail until *Brown v. Board of Education*, 347 U.S. 483 (1954), 58 years later. In *Brown*, this Court repudiated *Plessy* and "acknowledged the invidious effect of separating individuals solely because of their race. 'The impact is greater when it has the sanction of the law. . . .'" *Hi-Voltage*, 12 P.3d at 1073 (quoting *Brown*, 347 U.S. at 494).

As *Hi-Voltage* found, while *Brown* concerned state-imposed segregation in education, the courts did not hesitate to apply its principle in other contexts. *Hi-Voltage*, 12 P.3d at 1073 (citing Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 783 n.24 (1979)).

> In summarizing the common thread of these cases, Professor Van Alstyne observed that in the years between 1955 and 1976 following *Brown v. Board of Education*, "virtually every other race-related decision by the Supreme Court . . . 'removed the race line from our governmental systems.'" (Van Alstyne, *supra*, 46 U.Chi L.Rev. at p. 783.) "To the reasonably discerning, this appeared true even in instances involving highly controversial judicial decrees that paired racially identifiable schools, redrafted attendance lines, or mandated busing. In each instance, the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove. The object was thus to disestablish particular, existing

uses of race, not to establish new ones." (*Id.* at pp. 783-784, fn. omitted).

Hi-Voltage, 12 P.3d at 1073-74 (emphasis by the court).

Hi-Voltage found that *Brown* served as a landmark in this Court's active development of a "color-blind" jurisprudence. The California court, *id.*, cited *Hughes v. Superior Court of California,* 339 U.S. 460 (1950), which upheld an injunction against picketers seeking to have a supermarket hire African-American grocery clerks proportionate to the number of African-American customers at that store. This Court ruled "that it would encourage discriminatory hiring to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system." *Id.* at 463.

Hi-Voltage further relied on *Peterson v. Greenville*, 373 U.S. 224 (1963), in which this Court struck down a city ordinance requiring restaurant and hotel proprietors to maintain segregated facilities. When a state "passes a law compelling persons to discriminate against other persons because of race," it commits "a palpable violation of the Fourteenth Amendment." *Id.* at 248. *Hi-Voltage* also cited *Reitman v. Mulkey*, 387 U.S. 369 (1967), concerning a state constitutional amendment that, while facially neutral, encouraged and facilitated racial discrimination in the rental and sale of residential property. "As in analogous decisions, the state had violated the right of equal protection because it 'had taken affirmative action designed to make private discriminations legally possible.' *Id.* at 375." *Hi-Voltage*, 12 P.3d at 1074.

Hi-Voltage also cited *Loving v. Virginia*, 388 U.S. 1, 10 (1967), striking down a state ban on interracial marriage; *Anderson v. Martin*, 375 U.S. 399, 402 (1964), invalidating a state statute requiring designation of candidates' race on electoral ballots; *Shelley v. Kraemer*, 334 U.S. 1 (1948), prohibiting a state court's enforcement of restrictive covenants; and *Buchanan v. Warley*, 245 U.S. 60 (1917), invalidating a

statute forbidding blacks and whites from moving into a block where the greater number of residences were occupied by persons of the other race. *Hi-Voltage*, 12 P.3d at 1074 n.5. As the California court observed:

> Professor Alexander Bickel referred to these cases as "the great decisions of the Supreme Court" whose lesson "and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." (Bickel, *The Morality of Consent* (1975) p. 133 (Bickel).) For Professor Van Alstyne, "the message is commendably even stronger. Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers." (Van Alstyne, *supra,* 46 U.Chi. L.Rev. at p. 792, fn. omitted.)

Hi-Voltage, 12 P.3d at 1074-75.

C. The Civil Rights Act of 1964 Enacted To Prohibit Discriminatory Preference

Although this Court had rejected the principle of separate but equal and had directed the admission of students to public schools "on a racially nondiscriminatory basis with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), many officials charged with implementing the mandate were "reluctant if not recalcitrant" to perform their duty. *Hi-Voltage*, 12 P.3d at 1075. Congress enacted the Civil Rights Act of 1964 in response. "As the floor debates and committee reports attest, Congress intended that the Act reflect

Justice Harlan's understanding of the Constitution and "be 'colorblind' in its application." *Hi-Voltage*, 12 P.3d at 1075 (quoting *Bakke*, 438 U.S. at 415 (Stevens, J., concurring and dissenting)).

Title VII of the Civil Rights Act forbids, with limited exceptions, discrimination in employment on the basis of race, color, religion, sex, or national origin. This Court construed Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). African-American workers claimed a racially neutral hiring and promotion criterion unrelated to any job requirement discriminated against them in its actual effect. This Court agreed in a unanimous opinion: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . ." *Id.* at 429. To that end, the Act prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. Nevertheless, this Court stressed: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications . . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* at 430-31. *Hi-Voltage*, 12 P.3d at 1075.

Subsequently, this Court made clear in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-79 (1976), "Title VII . . . prohibits the discharge of 'any individual' because of 'such individual's race.' Its terms are not limited to discrimination against members of any particular race." . . . "This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' and create an 'obligation not to discriminate against whites.'" *Id.* at 280. Accordingly, regardless of the complainant's race, the "same standards" prohibiting employment discrimination applied. *Id.* *Hi-Voltage*, 12 P.3d at 1076 (citations omitted).

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), this Court cautioned that "Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579. *Hi-Voltage*, 12 P.3d at 1076.

From these cases the California court found:

> The Supreme Court's early interpretation of Title VII emphasized several factors: The purpose of Title VII was to ensure equal opportunity for all. Thus, discriminatory practices were forbidden irrespective of the victim's race. Relief could take the form of restitution to individual victims, including those establishing that an employer's pattern and practice of discrimination deterred their applications for employment. It could also be remedial to eradicate the effects of specific discriminatory practices, but courts had no obligation or authority to require any particular affirmative hiring or other employment practices. In other words, consistent with congressional intent, the court's construction confirmed and reinforced the role of government as color-blind in these matters.

Hi-Voltage, 12 P.3d at 1076.

D. Civil Rights Jurisprudence Reverts To Authorizing Race Preferences

The California court found that the analytical framework of Title VII jurisprudence was substantially modified in 1979 by *Steelworkers v. Weber*, 443 U.S. 193 (1979). There this Court upheld an employer's voluntarily initiated training program intended to eliminate a conspicuous racial imbalance in its craftworkers by providing that at least half of the trainees chosen be African-Americans "until the percentage of black skilled craftworkers in the . . . plant approximated the percentage of blacks in the local labor force." *Id.* at 199. A majority of the court found that "[e]xamination of [the legislative history of Title VII and the historical context from which the Act arose] makes clear that an interpretation . . . that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." *Id.* at 201-02. Because "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy,'" *id.* at 202, and "private and voluntary affirmative action efforts [was] one method of solving this problem," *id.* at 203, Congress could not have meant to ban them absolutely. *Id.* at 206. *Hi-Voltage*, 12 P.3d at 1076-77.

The California court observed that in concurring, Justice Blackmun found the court's expansive approach

> somewhat disturbing for me because, as Mr. Justice Rehnquist points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates 'arguable violations,' discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted." (*Weber*, supra, 443 U.S. 193, 212-213 (conc. opn. of Blackmun, J.).) Justice Blackmun also expressed concern that under the majority's rule, "the individual employer need not have engaged in discriminatory practices in the past." (*Id.* at p. 213).

Hi-Voltage, 12 P.3d at 1077.

Both Chief Justice Burger and then-Justice Rehnquist dissented. The Chief Justice criticized the majority's apparent reversal of settled law: "Until today, I had thought the Court was of the unanimous view that 'discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed' in Title VII." *Weber*, 443 U.S. at 218 (Burger, C.J., dissenting) (quoting *Griggs*, 401 U.S. at 431). In his view, the legislative history established that the Civil Rights Act "was conceived and enacted to make discrimination against *any* individual illegal, and I fail to see how 'voluntary compliance' with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others." *Weber*, 443 U.S. at 218. *Hi-Voltage*, 12 P.3d at 1077.

Justice Rehnquist's dissent recounted the numerous cases in which the Court had "never wavered in our understanding that Title VII 'prohibits *all* racial discrimination in employment, without exception for any group of particular employees.' " *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting) (quoting *McDonald*, 427 U.S. at 283). He also exhaustively analyzed extensive portions of Title VII's legislative history supporting that understanding. *Weber*, 443 U.S. at 226-54. For example, "Senator Humphrey [one of the bipartisan floor managers of the entire civil rights bill in the Senate] . . . stated that 'nothing in

the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.' " *Id.* at 237 (footnote omitted). Senator Kuchel, the other bipartisan floor manager, explained: "'Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind.' [Citation.]" *Id.* at 238. As its proponents emphasized, the Act " 'provides no preferential treatment for any group of citizens. In fact, it specifically prohibits such treatment.' " *Id.* at 248 (footnote and citations omitted). *Hi-Voltage*, 12 P.3d at 1077-78.

The California court found that in the wake of *Weber*, Title VII jurisprudence underwent a sea change in less than a decade from providing individualized restitutionary relief for specific injury to approving race-conscious practices by court order or employer-initiated programs. (Comparing *International Brotherhood of Teamsters v. U. S.*, 431 U.S. 324, 342-43 n.24, 346-47, 356-62, 374-75 n.61 (1977), with *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 445 (1986).) *Hi-Voltage*, 12 P.3d at 1078. "Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard for doing so given its earlier construction of Title VII. (*See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212-31 (1995) [reflecting similar difficulty developing coherent principles for consistently resolving equal protection challenges to race-based actions])." *Hi-Voltage*, 12 P.3d at 1078 (footnote omitted).

Hi-Voltage found that a comparable evolution occurred in decisions involving equal protection challenges. "Setting aside such holdings as *Hughes v. Superior Court of California*, 339 U.S. 460, and *Brown v. Board of Education*, 347 U.S. 483, five members of the Supreme Court in *Bakke*, 438 U.S. 265, expressed the view that the Constitution will tolerate race-based state action intended to remedy the effects of past

discrimination even on behalf of individuals who did not personally suffer as a result." *Hi-Voltage*, 12 P.3d at 1078 (citing *Bakke*, 438 U.S. at 316-19 (Powell, J.) *id.* at 324-26 and n.1 (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.)).

Hi-Voltage found that in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), this Court "accepted the licitness of race-conscious remedies with the caveat 'a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.'" *Id.* at 277. *Hi-Voltage*, 12 P.3d at 1078 n.9. Similarly, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-37 (allowing federal agencies to use a "narrowly tailored race-based remedy" in response to "lingering effects of racial discrimination against minority groups"), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (finding that "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors [could give rise to] an inference of discriminatory exclusion"), justified taking affirmative action to rectify the effects. *Hi-Voltage*, 12 P.3d at 1078 n.9. The California court also cited *United States v. Paradise*, 480 U.S. 149, 177 (1987), in which this Court

> expressly approved a judicial decree that included a racial quota for future promotions by the Alabama Department of Public Safety. Because the order was narrowly tailored to redress "pervasive, systematic, and obstinate discriminatory conduct of the Department" (*id.* at p. 167), it did not offend equal protection even though none of the beneficiaries had experienced promotional discrimination.

Hi-Voltage, 12 P.3d at 1078 n.9.

Similarly, in *Sheet Metal Workers*, 478 U.S. at 445, this Court held that Title VII "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief [in the form of fixed union membership goals] as a remedy for past discrimination" even if it may benefit individuals who were not identified victims of such discrimination. And in *Firefighters v. Cleveland*, 478 U.S. 501 (1986), this Court ruled that a consent decree requiring race-conscious promotions did not violate Title VII even though beneficiaries had not suffered discrimination. In reaching this result, a plurality of the court construed Title VII not only to guarantee equal employment opportunities but to "foster" them as well. *Sheet Metal Workers*, 478 U.S. at 448. But Justice O'Connor observed that "the plurality offers little guidance as to what separates an impermissible quota from a permissible goal." 478 U.S. at 494 (O'Connor, J., concurring and dissenting). *Hi-Voltage*, 12 P.3d at 1078-79.

The California court found that these later cases relied on a

> justification [that] replaced individual right of equal opportunity with proportional group representation. Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race. (See Van Alstyne, *supra,* 46 U. Chi. L.Rev. at 797-803.)

Hi-Voltage, 12 P.3d at 1079.

E. California Returns to Color-Blind Jurisprudence

Hi-Voltage noted that the argument in favor of the 1996 California Civil Rights Initiative stated in part: "A generation ago, we did it right. We passed civil rights laws to prohibit

discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides." *Hi-Voltage*, 12 P.3d at 1082. The California Supreme Court found that in adopting Proposition 209 the people of California intended to put back into place the historic "Civil Rights Act and equal protection that predated" *Weber*, 443 U.S. 193, and *Bakke*, 438 U.S. 265. That is "an interpretation reflecting the philosophy that 'however it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences for any purpose are anathema to the very process of democracy.' " *Hi-Voltage*, 12 P.3d at 1083.

> [T]hose who supported and enacted "the historic Civil Rights Act" sought to ensure equal opportunity for all and eliminate race and sex from decisionmaking in employment and other areas. By 1996, however, judicial construction of both the Act and the equal protection clause had engrafted a series of qualifications permitting race- and sex-conscious programs formulated to remediate the lingering effects of past discrimination or conspicuous imbalance in the work force. . . . [T]he voters intended . . . essentially a repudiation of the decisional authority that permitted such discrimination and preferential treatment notwithstanding antecedent statutory and constitutional law to the contrary.

Hi-Voltage, 12 P.3d at 1086-87.

Amici submit that the California court's interpretation of civil rights law is the proper one. The meaning and intent of equal protection, whether in that state's constitution, the Fourteenth Amendment, or the Fifth Amendment, is one that prohibits both discrimination and preferences on the basis of race. The periods of deviation from that principle, whether in

Dred Scott and *Plessy* or in *Weber* and *Fullilove*, are unfortunate aberrations based on ill-considered goals. Amici urge this Court to return the nation to the true concept of equal protection in which no individual is burdened or benefited on the basis of race.

II

THE STATUTORY RACE PREFERENCES FAIL THE *CROSON* TEST

A. The Statutes' Findings Fail the *Croson* Mandate To Identify Specific Discrimination

This Court held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 493, that the strict scrutiny test is necessary to ensure that the remedy chosen fits the legislative body's "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." The Court then spelled out the rationale for this requirement:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.").

Id. at 493-94 (citation omitted).

Croson held that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" *Id.* at 498. Yet the federal government has enforced a race preference program at least since the enactment of the

Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103(f)(2), providing that 10% of each grant shall be expended for Minority Business Enterprises. *See Fullilove*. There has been "no logical stopping point" to these race-preference programs and unless this Court acts none is foreseen.

Justice Kennedy's conclusion in *Croson*, 488 U.S. at 519-20, applies directly to the federal race-preference programs:

> The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

Because the federal program utterly fails to meet this standard, it is not a remedy but a preference and is forbidden by the equal protection component of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

B. The Federal Race-Preference Program Is Not Remedial but Merely Seeks Racially Proportional Participation

Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998), was a Fifth Amendment Equal Protection challenge to the Federal Communications Commission's (FCC) "equal employment opportunity (EEO)," *id.* at 346, programs imposed on radio broadcasters. The court found that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated." *Id.* at 351. However, the court found that the EEO regulations extended beyond outreach efforts to influence ultimate hiring decisions.

> The crucial point is not, as the [government] argue[s], whether they require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring. We think the regulations do just that. The entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation.

Id. at 351-52.

> As here, the government insisted that its program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities. That argument . . . presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition.

Id. at 352.

This "dubious proposition," of course, is the whole basis of the statutory race-preference program here at issue. The circuit court in *Lutheran Church* held: "It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals." *Id.* at 353. *Lutheran Church* therefore held the FCC regulations to be unconstitutional. *Id.* at 356.

C. The Chosen Remedy of Preference Lacks Any Nexus To, and Does Nothing To Correct, the Purported Violation

Adarand emphasized: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." 515 U.S. at 229. This passage was quoted by the Fifth Circuit in *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), which found: "This means that a race-conscious remedy must be framed to address the exact effects and harms of the discrimination at issue." *Id.*

Croson stated that if government had evidence that nonminority contractors were systematically excluding minorities, then government "could act to dismantle the closed business system by taking appropriate measures *against those who discriminate* on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509 (emphasis added and citations omitted).

This passage makes clear that federal agencies' duty is to act against the actual practitioners of discrimination, not merely strike out blindly against the entire class of construction contractors. As a last resort, only "in the extreme case" may the government craft some form of narrowly tailored race preference. Here, the government enforces its race and sex preferences not in extreme cases and as a last resort but in *all*

cases and as a first resort. The preference is tailored to nothing other than race balancing; there is no attempt to address and correct any actual instances of race discrimination.

D. The Race-Preference Statutes Make No Attempt To Restrict Their Benefits To Victims of Past Discrimination

The courts have strongly suggested that race-conscious relief should be targeted to actual victims of discrimination. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), held that when "a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race' but on the basis that they have been individually wronged." *Id.* at 700 n.7.

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), overturned a Boston public school's race-conscious policy in part because of its lack of victim-specificity. The court found, "there is no reason to assume that granting a remedy to one member of a particular race or ethnic group comprises a condign remedy for harm done to another, especially when those who have been harmed are easily identifiable and still within the institution that allegedly suffers from the vestiges of past discrimination." *Id.* at 808 (citation omitted).

By the same token, there is no reason to assume that the federal program of granting of preferences to one DBE is an appropriate remedy for harm done to another DBE, especially since any victims of actual discrimination in federal contracting could easily be invited to come forward and be recompensed by the wrongdoer, whether state or local agency or prime contractor. *Croson* held that "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 488 U.S. at 508. *Croson* further taught that the

desire to increase the representation of minorities, "standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake.'" *Id.* at 496.

CONCLUSION

The key factor ignored by the defenders of preference for race-based groups is "the principle that the Fourteenth Amendment guarantees equal protection to individuals and not to groups." *Coalition*, 122 F.3d at 704. The Equal Protection component of the Fifth Amendment extends this guarantee to the actions by the federal government. *Bolling v. Sharpe*, 347 U.S. at 499. The federal program of group preference in derogation of individual rights violates this constitutional command. For the reasons set forth herein, the decision of the Tenth Circuit should be reversed.

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Respectfully submitted,

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